IN THE

# United States

# Circuit Court of Appeals,

## FOR THE NINTH CIRCUIT.

Lou Raffour, Charged as Lou Taffour,
*Plaintiff in Error,*
*vs.*
United States of America,
*Defendant in Error.*

## BRIEF BY PLAINTIFF IN ERROR.

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The plaintiff in error was convicted on information containing three counts, charging him with unlawful possession and unlawfully maintaining a common nuisance. A jury returned a verdict of guilty on each of the three counts. [Tr. p. 15.] He was fined the sum of five hundred dollars ($500.00) on the first count, charging unlawful possession and a fine of five hundred dollars ($500.00) on the second count, charging unlawful possession and sentenced to a period of nine (9) months in the county jail of Santa Barbara county on the third count of the information. The plaintiff in error complains that the court erred in instructing the jury as follows:

"Now, gentlemen, the law requires in every criminal case that the defendant be proven guilty beyond a reasonable doubt. I have heretofore explained, I presume, to every one of you what reasonable doubt means, and that applies to this case as well as every other criminal case." An examination of the instruction [Tr. pp. 25-33] reveals that the court did not instruct the jury on the rule of reasonable doubt, nor did the court instruct the jury concerning the presumption of innocence.

It is elemental that the presumption of innocence is evidence in favor of the accused and is treated as evidence giving rise to proof to the full extent. In a leading and well considered case, the United States Supreme Court has held that it is reversible error for a court to fail to instruct the jury concerning the presumption of innocence. (Coffin v. U. S., 156 U. S. 432.) This presumption is a conclusion drawn by the law in favor of the citizen and it devolves upon the court in a criminal case to instruct the jury concerning this presumption of law. In the case last referred to (Coffin v. U. S., *supra*) the court said, "Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty." In other words, this presumption is an instrument of proof created by the law in favor of an accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has

created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

It will be observed that the charge of the court in the case at bar is silent on these two most important and elementary principles of criminal jurisprudence, and the defendant is left without the protection which the law gives to an accused by presuming his innocence until his guilt is established beyond a reasonable doubt.

The plaintiff in error submits that the court erred in instructing the jury as follows:

"Gentlemen, if you find that this defendant kept intoxicating liquirs in the place he had there as a soft drink place, in violation of the law; that is to say, if he kept these things there for beverage purposes, if he kept them there unlawfully, if it was not liquor that was acquired before the law went into effect, and if that place was not his residence, he would be maintaining a nuisance and would be guilty under the third charge in this information." The vice of this instruction is that it does not fully or correctly define for the jury what constitutes a common nuisance under the law. Section 21 of the National Prohibition Act reads as follows:

> "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, and all intoxicating liquor and property

kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction."

It is apparent that the proper construction of such provision of the law is that a common nuisance consists in the maintaining of a place where intoxicating liquor is manufactured, sold or bartered and not the keeping for beverage purposes. Obviously, if the place were his residence, it would not be a common nuisance to keep intoxicating liquor legally at his residence "for beverage purposes." Therefore, the jury was not advised by the court in the instruction complained of, of what a common nuisance consists. (U. S. v. One Cadillac Touring Car, 274 Federal 470.)

The plaintiff in error complains of the following instruction:

"The government permits the use of certain intoxicating liquors to be mixed with cordials, but the alco-

holic content is kept below one half of one per cent, and these permits are to be given to people who are supposed to be responsible and will keep such alcoholic content down."

The plaintiff in error complains of this instruction because it is pregnant with insinuation of the guilt of the defendant. It is clearly cast in very unfortunate phraseology. It might well be construed by a jury that in the opinion of the court the defendant was guilty. An instruction somewhat analogous to the one complained of was condemned by the court in the case of the State v. Cater, 100 Ia. 501, 69 North N. W. 880. In the latter case the trial court gave the following instruction:

> "The defendant here sets up no affirmative defense and no matters in extenuation. He relies wholly upon the denial of his guilt, and upon his anticipation of a failure bv the state to prove a case against him."

In criticizing this instruction, the court said:

> "The instruction impresses us as pregnant with insinuation of the guilt of the defendant and manifestly unfair in its phraseology."

The plaintiff in error objects to the following instruction by the court: "The burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used." This instruction follows the phraseology of the law. The instruction should read

that when the court instructs that the burden of proof is on the defendant, it means that the evidence must be sufficient to raise a reasonable doubt of the defendant's guilt. (Jarvis v. State, 138 Ala. 17, 34 So. 1025.) In other words, it must first be established beyond a reasonable doubt by such evidence as rebuts the presumption of innocence that the accused had in his possession contraband liquor. Then, and not until then, does the burden of proof shift to the defendant for him to explain the lawful character of such possession. (Coffin v. U. S., 156 U. S. 432 at 461.)

It is submitted that the error complained of by the plaintiff in error, constitutes reversible error and that by reason of the failure of the court to give to the accused the benefit of the instruction concerning the presumption of innocence and the rule of reasonable doubt, the rights of the defendant below were prejudiced. Also the failure of the court to clearly or correctly define what constitutes common nuisance within the meaning of the law made it so unlikely that the jury could determine such fact as to constitute reversible error. Further, it is submitted, in fact, all of the error complained of is of such a serious character as to render necessary a reversal of the judgment of conviction. It will be noted that trial counsel for the plaintiff in error saved no exceptions. It is of course well established that the Circuit Court of Appeals will review the record where no exceptions are reserved or proceedings had to correct the error in the District Court in a similar case, where the life

or liberty of a person is at stake and the court will not sit by and allow error to prejudice the rights of an accused even though no technical exceptions are reserved at the time. (Sykes v. U. S., 204 Fed. 909; Humes v. U. S., 182 Fed. 485; Fielder and Others v. U. S., 227 Fed. 832; Gillette v. U. S., 236 Fed. 215; Clyatt v. U. S., 197 U. S. 207; Crawford v. U. S., 213 U. S. 183; Wiborg v. U. S., 163 U. S. 632; Pettine v. Territory of New Mexico, 201 Fed. 489.)

Moreover, there is the legal presumption that error produces prejudice, and it is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice and could not have prejudiced the complaining party that the rule, that error without prejudice is no ground for reversal, is applicable. (Ayer v. Territory of New Mexico, 201 Fed. 497.)

We submit that the judgment of conviction should be reversed as to all of the counts ,and we so pray.

Respectfully submitted.

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